

AUG 25 2003

COMMONWEALTH OF MASSACHUSETTS

Middlesex, ss

Superior Court Department
of the Trial Court
Civil Action No. 00-4884

CITY OF EVERETT,
Plaintiff,

v.

BARLETTA ENGINEERING CORP. et al.,
Defendants/Third-Party Plaintiffs,

v.

EARL R. FLANSBURGH ASSOCIATES, INC. et al.,
Third-Party Defendants,

B&T MASONRY CONSTRUCTION CO., INC.,
Third-Party Defendant/Fourth-Party Plaintiff,

v.

FOSTER-SOUTHEASTERN, INC.,
Fourth-Party Defendant.

FOURTH-PARTY COMPLAINT OF
B&T MASONRY CONSTRUCTION COMPANY, INC.

INTRODUCTION

This action involves a public construction project wherein the Plaintiff City Of Everett ("Everett") was the project owner and the Defendant/Third-Party Plaintiff Barletta Engineering Corp. ("Barletta") was the project's general contractor. By this Fourth-Party Complaint, B&T seeks breach of contract, breach of implied warranty, indemnification, and/or contribution from the Fourth-Party Defendant Foster-

Southeastern, Inc. ("Foster") for damages for which B&T may be liable for to the Defendant/Third-Party Plaintiff.

PARTIES

1. The Third-Party Defendant/Fourth-Party Plaintiff B&T Masonry Construction Company, Inc. ("B&T") is a Massachusetts corporation with a place of business at 121 Mystic Avenue, Medford, Middlesex County, Massachusetts.
2. The Fourth-Party Defendant Foster-Southeastern, Inc. ("Foster") is upon information and belief, a foreign corporation doing business in Massachusetts with a place of business at 46 Spring Street, Holbrook, Norfolk County, Massachusetts.

FACTS

3. Barletta, as general contractor, and Everett, as owner, entered into a written contract ("Contract") wherein Barletta was the general contractor for a contract or project known as the Lafayette Elementary School in Everett, Massachusetts ("Project").
4. In furtherance of its Contract with Everett, Barletta entered into a subcontract ("Subcontract") with B&T, wherein B&T, as subcontractor, agreed to furnish labor, materials, and equipment to perform the masonry work at the Project.
5. B&T in furtherance of its Subcontract with Barletta, issued a purchase order ("Purchase Order") to Foster wherein Foster furnished, *inter alia*, concrete masonry units ("CMU") with a Dry Block admixture used or employed in construction of the Project.
6. On May 13, 2002, Everett filed a Second Amended Supplemental Complaint against Barletta, among others, seeking damages attributable to water infiltration and penetration in connection with the Project. A copy of Everett's Second Amended Supplemental Complaint is attached hereto as Exhibit A.

7. In response to Everett's Second Amended Supplemental Complaint, Barletta filed an Amended Third-Party Complaint against B&T, among others. A copy of Barletta's Amended Third-Party Complaint Of Barletta Engineering Corporation is attached hereto as Exhibit B.

8. Everett's Second Amended Supplemental Complaint references an investigation performed by Wiss, Janney, Elstner & Associates, Inc. ("WJE") at the Project.

9. On March 13, 2002, in support of WJE's investigation, WJE prepared a report concluding specific alleged deficiencies in portions of the Project's CMU and Dry Block admixture.

10. The WJE report refers to alleged CMU and Dry Block admixture deficiencies installed by B&T at the Project.

COUNT I – BREACH OF CONTRACT

11. B&T realleges the allegations contained in Paragraphs 1 through 10 above as if fully set forth herein.

12. Foster failed, without legal excuse, to furnish suitable CMU in accordance with the Purchase Order.

13. B&T has suffered damages as a result of Foster's breach.

WHEREFORE the Fourth-Party Plaintiff B&T Masonry Construction Company, Inc. demands judgment against Foster-Southeastern, Inc. for damages, plus interest, costs and attorneys' fees.

COUNT II – BREACH OF IMPLIED WARRANTY

14. B&T realleges the allegations contained in Paragraphs 1 through 13 above as if fully set forth herein.

15. Foster owed B&T a duty to exercise reasonable care in furnishing materials to be incorporated in the Project including the manufacture of the Project's CMU.

16. Everett alleges, in part, Barletta failed to provide masonry work free of defect and the alleged deficient CMU caused water infiltration and penetration in connection with the Project causing damage.

17. Barletta's Amended Third-Party Complaint against B&T alleges to the extent Barletta is liable to Everett, Barletta's damages are attributable to B&T's failure to exercise reasonable care in performance of B&T's work.

18. To the extent that judgment in favor of Everett and, by extension, Barletta against B&T is entered for the actions, inactions and/or omissions of B&T, which B&T denies, Foster must be held liable to B&T to the extent Foster is adjudged responsible for such judgment.

WHEREFORE the Fourth-Party Plaintiff B&T Masonry Construction Company, Inc. demands judgment against Foster-Southeastern, Inc. for damages, plus interest, costs and attorneys' fees.

COUNT III - CONTRIBUTION

19. B&T realleges the allegations contained in Paragraphs 1 through 18 above as if fully set forth herein.

20. If Everett and, by extension Barletta, were damaged as alleged, said damages were entirely the result of the actions, inactions and/or omissions of Foster.

21. The cause of any alleged damages to Everett and, by extension, Barletta is the responsibility of Foster by virtue of Foster's failure to furnish adequate materials to B&T that were used or employed in construction of the Project.

22. To the extent that judgment in favor of Everett and, by extension, Barletta against B&T is entered for the actions, inactions and/or omissions of B&T, Foster must indemnify and contribute to B&T to the extent Foster is adjudged responsible for such judgment.

23. B&T is blameless and entitled to contribution, costs and attorneys' fees from Foster.

WHEREFORE the Fourth-Party Plaintiff B&T Masonry Construction Company, Inc. demands judgment against Foster-Southeastern, Inc. for damages, plus interest, costs and attorneys' fees.

COUNT IV - INDEMNIFICATION

24. B&T realleges the allegations contained in Paragraphs 1 through 18 above as if fully set forth herein.

25. Foster is responsible for the claims made by Everett and, by extension, Barletta.

26. To the extent that judgment in favor of Everett and, by extension, Barletta against B&T is entered for the actions, inactions and/or omissions of B&T, Foster must indemnify B&T.

27. B&T is blameless and entitled to contribution, costs and attorneys' fees from Foster.

WHEREFORE the Fourth-Party Plaintiff B&T Masonry Construction Company, Inc. demands judgment against Foster-Southeastern, Inc. for damages, plus interest, costs and attorneys' fees.

B&T demands a trial by jury as to all issues so triable.

B&T MASONRY CONSTR. CO., INC.
By its attorneys,

Francis A. Shannon, III, Esq.
BBO # 560651
Steven Shane Smith, Esq.
BBO # 630713
Shannon Law Associates, Inc.
One Bowdoin Square, 9th Floor
Boston, MA 02114
(617) 263-1313

CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that I served a true copy of the above document upon the following parties by first class mail, postage prepaid, this ____ day of November, 2002:

Ronald J. Salvato, Esq.
City Solicitor's Office
City of Everett
484 Broadway
Everett, MA 02149

Carolyn M. Francisco, Esq.
Corwin & Corwin, LLP
One Washington Mail
Boston, MA 02108

Bert J. Capone, Esq.
Cetrulo & Capone, LLP
2 Seaport Lane, 10th Floor
Boston, MA 02210

Jeffrey L. Alitz, Esq.
Donovan Hatem, LLP
2 Seaport Lane, 8th Floor
Boston, MA 02210

Mark B. Lavoie, Esq.
McDonough, Hacking, Neumeier &
Lavoie, LLP
11 Beacon Street, Suite 1000
Boston, MA 02108

Gregg S. Blackburn, Esq.
Casner & Edwards, LLP
303 Congress Street
Boston, MA 02210

Thomas C. Federico, Esq.
Morrison, Mahoney & Miller
250 Summer Street
Boston, MA 02210

Kenneth J. DeMoura, Esq.
Adler, Pollock & Sheehan
175 Federal Street
Boston, MA 02110

John J. Ryan, Jr. Esq.
Ryan, Coughlin & Betke, LLP
175 Federal Street
Boston, MA 02110

Andrey L. Nee, Esq.
Gadsby Hannah, LLP
225 Franklin Street
Boston, MA 02110

John P. Connolly, Esq.
Peabody & Arnold, LLP
50 Rowes Wharf
Boston, MA 02110-3342

David M. Governo, Esq.
Governo Law Firm LLC
260 Franklin Street
Boston, MA 02110

Michael F. Aylward, Esq.
Morrison, Mahoney & Miller, LLP
250 Summer Street
Boston, MA 02210

John O. Mirick, Esq.
Mirick, O'Connell,
DeMallie & Lougee, LLP
100 Front Street
Worcester, MA 01608-1477

Francis A. Shannon, III, Esq.
Steven Shane Smith, Esq.

MS:FA5:B&T:Barbara;complaint4th